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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 410

GARY DUNCAN,

Appellant,

v.

STATE OF LOUISIANA,

Appellee.

On Appeal From the Supreme Court of Louisiana.

JURISDICTIONAL STATEMENT

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July, 1967.

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JURISDICTIONAL STATEMENT

THE OPINIONS BELOW

The Memorandum Decision of the Supreme Court of Louisiana is reported at 250 La. 253, 195 So. 2d 142, and appears herein as Appendix A. No other written opinions have been delivered.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This is a criminal prosecution against the appellant, Gary Duncan. Appellant was charged and convicted in the Twenty-Fifth Judicial District Court of Louisiana of simple battery in violation of Louisiana Revised Stat-

utes, Section 14:35. (R. 1)[1] Simple battery is defined as a battery without a dangerous weapon. Article 779 of the Code of Criminal Procedure of Louisiana denies a jury trial on that charge. Appellant contended that Article 779 is invalid because it is repugnant to the Sixth and Fourteenth Amendments to the Constitution of the United States. The decision of the Supreme Court of Louisiana was in favor of the validity of Article 779.

(ii) The judgment or decree sought to be reviewed is the ruling of the Supreme Court of Louisiana denying appellant's application for a writ of certiorari. (R. 31). That ruling was issued on February 20, 1967 and entered on March 6, 1967. No petition for rehearing was filed. The Notice of Appeal was filed in the Twenty-Fifth Judicial District Court of Louisiana, the court possessed of the record, on May 15, 1967. (R. 33). On July 6, 1967, Honorable Joe W. Sanders, Associate Justice of the Supreme Court of Louisiana, extended appellant's time to docket the appeal in this Court to July 24, 1967.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257(2).

(iv) Cases sustaining the jurisdiction of this Court are:

Application of Gault, 87 S. Ct. 1428 (1967);
Giaccio v. Pennsylvania, 382 U.S. 399 (1966);
Hoyt v. Florida, 368 U.S. 57 (1961);
Ferguson v. Georgia, 365 U.S. 570 (1961).

(v) The validity of Article 779 of the Louisiana

[1] "R." references are to the record on appeal.
"Tr." references are to the official transcript of the testimony in the trial court which has been filed with the record in this Court.

Code of Criminal Procedure is here involved. The full text of that article is as follows:

> Art. 779. Trial of Misdemeanors.
>
> A defendant charged with a misdemeanor shall be tried by the Court without a jury.[2]

Misdemeanors in Louisiana are all crimes not punishable at hard labor. LA. REV. STAT. 14:2 (1950). This includes at least one offense punishable by up to ten years imprisonment. LA. REV. STAT. 14:34.1 (Cum. Supp. 1962). In this case, the maximum sentence provided by the statute is two years imprisonment plus a $300 fine. LA. REV. STAT. 14:35 (1950).

QUESTION PRESENTED BY THE APPEAL

The following question is presented by this appeal:

Does a state statute that denies the right to trial by jury in a prosecution for battery, where a two year prison term may be imposed, violate the Sixth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE FACTS OF THE CASE

Gary Duncan, appellant herein, is a citizen of the United States, a Negro, and a resident of Plaquemines Parish, Louisiana. On December 5, 1966, appellant was charged with simple battery in a bill of information filed in the Twenty-Fifth Judicial District Court of Louisiana. (R. 1) In Louisiana, simple battery is a crime punishable by a term of two years imprisonment and a fine of $300. LA. REV. STAT. 14:35 (1950). Because simple battery is not punishable by imprisonment at hard labor, the crime is categorized as a "misdemeanor" at state law. LA. REV.

[2] Article 779 is consistent with Section 7, Article 41 of the Louisiana Constitution. The provisions of Louisiana law relating to trial by jury are set forth in Appendix C.

STAT. 14:2 (1950). Article 779 of the Code of Criminal Procedure of Louisiana in express terms denies the right to trial by jury in misdemeanor cases.[3]

On January 25, 1967, prior to trial in the state court, appellant filed a "Demand for Trial by Jury," in which he contended that the right to trial by jury on the charge against him was secured by the Sixth and Fourteenth Amendments to the United States Constitution. (R. 3) The demand was rejected by the trial judge on the authority of Article 779 of the Louisiana Code of Criminal Procedure. (R. 7; Tr. 3) Appellant reserved a bill of exception in the manner provided by Louisiana law. (R. 5) Appellant was then tried before a judge, without a jury.

The charge against appellant was based on an incident involving his two young cousins, Bert Grant and Bernard St. Ann, and four white boys. In the fall of 1966, pursuant to an order for desegregation issued by the United States District Court in New Orleans,[4] Grant and St. Ann transferred to the previously all-white Boothville Venice School in Plaquemines Parish. (See Tr. 11, 66, 81) Thereafter, these boys were physically assaulted, threatened and otherwise harassed by white students in the school. (Tr. 8, 13, 27, 69) On October 18, 1966, as appellant was driving home on U.S. Highway 23, near the Boothville Venice School, he observed Grant and St. Ann confronted by a group of white boys. (See Tr. 21) He stopped his car and asked his cousins what was going on. Grant replied that the white boys wanted to fight. (Tr.

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[3] The legislative categorization of common law offenses as "misdemeanors" or "felonies" is irrelevant for purposes of interpreting the Sixth Amendment jury trial guarantee. Callan v. Wilson, 127 U.S. 540, 549 (1888). Moreover, the crime defined by LA. REV. STAT. 14:35 (1950) is a felony under federal standards. 18 U.S.C. § 1.

[4] United States v. Plaquemines Parish School Board, 11 Race Rel. L. Rep. 1764 (E.D. La. Aug. 26, 1966).

82, 92) Appellant told his cousins to get into his car. (Tr. 26, 82, 92) At the trial, the white boys and a white onlooker some distance away testified that after the Negro boys went to appellant's car, appellant slapped one of the white boys on the elbow. (Tr. 7, 27-28, 52, 62-63) Appellant and his cousins each testified that appellant had not slapped the boy, but had merely touched him on the arm, as a manner of expression, while telling him that it would be best if he went home. (Tr. 72, 84, 92)

The trial judge resolved the factual dispute against the appellant and found him guilty as charged. (R. 2) On February 1, 1967, appellant perfected a formal bill of exception on the jury trial issue, in accordance with state procedure. (R. 5, 10) He was then sentenced to sixty days in prison and a $150 fine, with the proviso that if the fine and costs are not paid, an additional twenty day sentence shall be served. (R. 2)

On February 6, 1967, appellant filed in the Supreme Court of Louisiana an application for a writ of certiorari to review the judgment below, and specifically the ruling of the court on appellant's demand for trial by jury. (R. 11) In the application, appellant expressly argued that Article 779 of the Louisiana Code of Criminal Procedure is "unconstitutional on its face", under the Sixth and Fourteenth Amendments of the United States Constitution, "insofar as it denied [appellant] the right to trial by jury in this case." (R. 18) On February 20, 1967, the Supreme Court of Louisiana denied appellant's application for a writ of certiorari. (R. 31) The Memorandum Decision stated: "No error of law in the ruling complained of." 250 La. 253, 195 So. 2d 142 (1967); Appendix A. The Supreme Court of Louisiana is the highest court in the State of Louisiana.

On February 21, 1967, the trial court set bond at $1,500, pending disposition of this matter in this Court. Appellant is free on bond.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

If this case had been tried in a federal court, the appellant unquestionably would have been entitled to trial by jury.[5] Thus, this appeal squarely raises the question of the applicability of the jury trial guarantee of the Sixth Amendment to serious state criminal proceedings.

(i) *This Court's Earlier Refusal to Apply the Sixth Amendment Jury Trial Guarantee to the States Was Based on Interpretation of the Fourteenth Amendment That Has Long Been Abandoned*

Almost seventy years ago, in *Maxwell v. Dow*, 176 U.S. 581 (1900), this Court held that the Fourteenth Amendment does not make applicable to the states the specific guarantees of the Sixth Amendment. The Court stated that the mandate of due process of law is satisfied whenever a defendant is tried according to established

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[5] In federal proceedings, this Court has interpreted the Sixth Amendment jury trial guarantee to be applicable to the trial of all "crimes," but not to the trial of "petty offenses." Cheff v. Schnackenberg, 384 U.S. 373 (1966); District of Columbia v. Clawans, 300 U.S. 617, 624 (1937); District of Columbia v. Colts, 282 U.S. 63 (1930); Callan v. Wilson, 127 U.S. 540, 557 (1888). It is clear that simple battery, as defined by Louisiana Revised Statutes 14:35, is a crime, and not a petty offense, regardless of whether the test is a potential maximum term of imprisonment of more than six months (18 U.S.C. §1; Cheff v. Schnackenberg, *supra*, 384 U.S. at 379-80), or an offense indictable at common law, District of Columbia v. Colts, *supra*, 282 U.S. at 73; *Callan v. Wilson*, *supra*, 127 U.S. at 554-57. The maximum sentence under the statute is two years imprisonment. Moreover, battery was an indictable offense at common law. III BLACKSTONE, COMMENTARIES *121; IV *Id.* at *6, 216-17; I CHITTY, CRIMINAL LAW 138-40 (1819); I RUSSELL, CRIMES AND MISDEMEANORS *60 (1819); II HAWKINS, PLEAS OF THE CROWN 17 (7th ed. 1795). In jurisdictions applying the common law or Sixth Amendment standard, a defendant charged with battery has consistently been guaranteed the right to trial by jury. *In Re* Robinson, 20 D. C. 570, 572 (Sup. Ct. D. C. 1892); State v. Stewart, 89 N. Car. 563, 564 (1883); Work v. State, 2 Ohio St. 296 (Sup. Ct. 1853).

and uniform procedures within a state. 176 U.S. at 602-05. *Accord, West v. Louisiana*, 194 U.S. 258, 264 (1904). Accordingly, in *Maxwell* the Court sustained the use of an eight man jury in a state criminal proceeding, although two years earlier, in *Thompson v. Utah*, 170 U.S. 343 (1898), the Court had held that the Sixth Amendment prohibits the use of a jury of less than twelve in federal criminal trials. The jury trial question has not since been considered by the Court, although in cases involving other issues there have been statements that a jury trial in state criminal cases is not secured by the Fourteenth Amendment. See, *e.g.*, *Fay v. New York*, 332 U.S. 261, 288 (1947); *Palko v. Connecticut*, 302 U.S. 319, 324 (1937); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).[6]

In recent years, however, the Court has held applicable to state criminal proceedings every guarantee of the Sixth Amendment, except the right to trial by jury. See *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *In re Oliver*, 333 U.S. 257 (1948) (public trial and notice of the accusation); *Irwin v. Dowd*, 366 U.S. 717 (1961) (impartial jury); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation); *Washington v. Texas*, 87 S. Ct. 1920 (1967) (compulsory process); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel).[7]

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[6] The applicability to state criminal proceedings of the Sixth Amendment jury trial guarantee has thus never been considered in the context of a complete denial of trial by jury. See Maxwell v. Dow, *supra*, 176 U.S. at 612 (Mr. Justice Harlan dissenting).

[7] These decisions are part of a broader trend toward the application to state criminal trials of rights secured by the Bill of Rights. See Ker v. California, 374 U.S. 233 (1963) (Fourth Amendment standard of legality of searches without a warrant); Aguilar v. Texas, 378 U.S. 108 (1964) (Fourth Amendment standard for the issuance of a search warrant); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusion of illegally seized evidence); Malloy v. Hogan, 378 U.S. 1 (1964) (Fifth Amendment protection against self-incrimination); Robinson v. California, 370 U.S. 660 (1962) (Eighth Amendment protection against cruel and unusual punishment); Pilkinton v. Circuit Court, 324 F. 2d 45 (8th Cir. 1963) (Eighth Amendment protection against excessive bail).

These cases have completely undermined the rationale of *Maxwell* by broadly rejecting the proposition that the guarantees of the Sixth Amendment do not apply in state criminal proceedings. In fact, the language of the more recent decisions suggests that all Sixth Amendment rights are applicable in state courts. In *Washington v. Texas, supra*, Mr. Chief Justice Warren, writing for eight members of the Court, stated:

> At one time, it was thought that the Sixth Amendment had no application to state criminal proceedings [citing *West v. Louisiana*, 194 U.S 258, 264 (1904)]. That view no longer prevails, and in recent years we have increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law.[8]

And in *Pointer v. Texas, supra*, Mr. Justice Black, for the Court, stated:

> In light of *Gideon*, *Malloy*, and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the states by virtue of the Fourteenth Amendment, the statements made in *West* and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law.[9]

See *Parker v. Gladden*, 385 U.S. 363 (1966).[10] In light of these decisions rejecting the rationale of *Maxwell*, it

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[8] 87 S. Ct. at 1922.

[9] 380 U.S. at 406.

[10] "We believe that the statements of the bailiff to the jurors are controlled by the command of the Sixth Amendment, made applicable to the States through the Due Process Clause of the Fourteenth Amendment. It guarantees that 'the accused shall enjoy the right to a . . . trial, by an impartial jury . . . [*and*] be confronted with the witnesses against him. . . .'"

385 U.S. at 364 (Emphasis added).

is appropriate that the specific holding of *Maxwell* should now be reconsidered by the Court.[11]

(ii) *The Right to Trial by Jury in Criminal Cases Is Basic to Anglo-American Concepts of Due Process of Law*

a. *Historical Antecedents of the Right to Trial by Jury*

In deciding to apply specific guarantees of the Bill of Rights to state criminal proceedings, the Court has emphasized the significance accorded these rights in the heritage of the English law. *E.g., Klopfer v. North Carolina, supra,* 386 U.S. at 223-26; *Pointer v. Texas, supra,* 380 U.S. at 403-05.

Trial by jury in criminal cases was recognized as a fundamental safeguard of individual liberties centuries before the adoption of the American Constitution. The right is traceable to the earliest Saxon colonies,[12] and constituted one of the fundamental articles of the Magna Charta: "No freeman shall be taken or imprisoned, or be

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[11] See note 6, *supra.* The applicability of the Sixth Amendment jury trial guarantee to the states has been recognized in the lower federal courts as an important, but unsettled question. In Randel v. Beto, 354 F. 2d 497 (1965), the United States Court of Appeals for the Fifth Circuit held that a habeas corpus petitioner's claim based on application of the Sixth Amendment jury trial guarantee to state proceedings was an "important question . . . of constitutional law," entitling petitioner to a hearing. 354 F. 2d at 501. In United States, *ex rel.* Gerchman v. Maroney, 355 F. 2d 302 (3d Cir. 1966), Judge Freedman suggested that past statements in this Court concerning the applicability of the jury trial guarantee to the states "are not . . . flatly decisive of the question," in light of the recent decisions holding other guarantees of the Bill of Rights applicable to state proceedings. 355 F. 2d at 313. Judge Freedman refrained from passing on the issue, because the case was disposed of on other grounds, and because he thought it "not unlikely that we may soon have an authoritative expression on the subject from the Supreme Court". 355 F. 2d at 315. The other members of the panel thought the question foreclosed by decisions of this Court. 355 F. 2d at 315-16.

[12] III BLACKSTONE, *op. cit. supra,* at *349; PERRY, SOURCES OF OUR LIBERTIES, 7-9 (1959).

disseised of his freehold, or liberties . . . but by the lawful judgment of his peers. . . ." Magna Charta, ch. 39, translated and quoted in COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45. (Brooke's 5th ed. 1797). Blackstone described the right to trial by jury in criminal cases as "the most transcendent privilege which any subject can enjoy, or wish for." III BLACKSTONE, *op. cit. supra*, at *379.[13] In his discussion of trial by jury, Lord Coke stated that this "ancient" form of trial "excells [all] others." I CO. LITT. *155b. The guarantee of trial by jury in criminal cases was included in the English Bill of Rights of 1689,[14] which served as one of the basic sources for the Bill of Rights to the United States Constitution. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791 p. 19 (1955).

The right to trial by jury in criminal cases was fundamental to the American colonists. Indeed, Parliamentary infringement of this right was one of the major grievances of the colonists against British rule. *E.g.*, John Adams, *Instructions of the Town of Braintree, Massachusetts on the Stamp Act* (October 14, 1765);[15] Resolution No. 5, Declaration and Resolves of the First Continental Congress

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[13] ". . . [T]he liberties of England cannot but subsist, so long as the *palladium* . . . [of trial by jury] remains sacred and inviolate; not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations which may sap and undermine it; by introducing new and arbitrary methods of trial by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern."

IV BLACKSTONE, *op. cit. supra*, at *349-50.

[14] I Will. III and Mary II, sess. 2, c. 2 (1689), para. 11.

[15] Reprinted in COMMAGER, DOCUMENTS OF AMERICAN HISTORY 56-57 (5th ed. 1949).

(October 14, 1774);[16] The Declaration of Independence (July 4, 1776).[17]

Between the War of Independence and the formation of the American Union, constitutions were adopted by eleven of the former Crown colonies. Without exception, these documents guaranteed trial by jury in criminal cases, after the pattern of English law.[18] The importance of trial by jury at this period in our history is further evidenced by the fact that it is one of the few individual rights included in the body of the United States Constitution, Art. III, Section 2. See THE FEDERALIST No. 83 (Hamilton). It is the only such provision that is reiterated in the Bill of Rights.

In his treatise on the Constitution published in 1833, Mr. Justice Story reflected the contemporary view of the "antiquity" and "importance of trial by jury in criminal cases."

> It was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude. The right constitutes one of the fundamental articles of Magna Charta. . . . When our more im-

[16] Reprinted in *Id.* at 82-83.

[17] Reprinted in *Id.* at 100-02.

[18] See THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS, V, 2594-98 (1909) (New Jersey Constitution of 1776); Ibid., V, 2623-38 (New York Constitution of 1777); Ibid., VI, 3248-57 (Constitution of South Carolina of 1778); Ibid., II, 777-85 (Constitution of Georgia of 1777); Ibid., VII, 3812-14 (Constitution of Virginia of 1776, Sec. 8); Ibid., V, 3081-84 (Constitution of Pennsylvania of 1776, Sec. IX); Ibid., III, 1686-91 (Constitution of Maryland of 1776, Sec. XIX); Ibid., V, 2787-89 (Constitution of North Carolina of 1776, Sec. IX); Ibid., III, 1888-93 (Constitution of Massachusetts of 1780, Pt. 1, Sec. 12); Ibid., IV, 2453-57 (Constitution of New Hampshire of 1784, Art. I, Sec. 15); I Laws of the State of Delaware, 1700-1797, App. 1981 (New Castle, 1797) (Delaware Declaration of Rights of 1776, Sec. 14). In addition, Vermont, which had not been recognized as a Crown Colony, included the jury trial guarantee in its Constitution of 1777. THORPE, *op. cit. supra*, VI, 3737-42.

> mediate ancestors removed to America, they brought this great privilege with them, as their birthright and inheritance, as a part of that admirable common law, which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our state constitutions as a fundamental right, and the constitution of the United States would have been justly obnoxious to the most conclusive objection, if it had not recognized and confirmed it in the most solemn terms.[19]

The history of the right to trial by jury and its reception in this country clearly establish that it is one of the basic rights preserved by our Constitution.

b. *Recognition by this Court of the Fundamental Importance of Trial by Jury in Criminal Cases*

This Court has given vigorous expression to the fundamental role of trial by jury in our system of law. In *Irwin v. Dowd*, 336 U.S. 717 (1961), the Court stated:

> England, from whom the Western world has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, *the most priceless of which is that of trial by jury.* This right has become as much American as it was once the most English. Although this Court has said that the Fourteenth Amendment does not demand the use of jury trials in a state's criminal procedure, Fay v. New York, 332 U.S. 261; Palko v. Connecticut, 302 U.S. 319, every state has constitutionally provided trial by jury. . . . *In the ultimate analysis, only the jury can strip a man of his liberty or his life.*[20]

See *Turner v. Louisiana*, 379 U.S. 466, 471-73 (1965).

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[19] 2 Story, Constitution of the United States 527 (2d ed. 1851).

[20] 366 U.S. at 721-22 (Emphasis added).

In *Cheff v. Schnackenberg*, 384 U.S. 373 (1966), this Court ruled that even in criminal contempt cases, where there is considerable question about the practice at common law,[21] a sentence in excess of six months, the statutory maximum for "petty offenses",[22] may not be imposed by a federal court without trial by jury. Last term, in *Bloom v. Illinois*, the Court granted certiorari to consider whether the rule articulated in *Cheff* was applicable, by virtue of the Fourteenth Amendment, to criminal contempt proceedings in state courts.[23]

The Court has shown its concern for the integrity of trial by jury in a long line of decisions, dating back to *Strauder v. West Virginia*, 100 U.S. 303 (1880), invalidating the systematic exclusion of Negroes from grand and petit juries. *E.g.*, *Norris v. Alabama*, 294 U.S. 587 (1935); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Eubanks v. Louisiana*, 356 U.S. 584 (1958). In recent years, this Court and the lower federal courts have further secured the common law mandate that no man be convicted other than by a "judgment of his peers"[24] by insisting that juries in state and federal courts be selected in a manner that will ensure a representative cross section of the community on venire lists. *E.g.*, *Whitus v. Georgia*, 385 U.S. 545 (1967) (exclusion of Negroes); *Hernandez v. Texas*, 347 U.S. 475 (1954) (exclusion of Mexican-Americans); *Labat v. Bennett*, 365 F. 2d 698 (5th Cir. 1966) (en banc), *cert. denied*, 386 U.S. 991 (1967) (exclusion of wage earners); *White v. Crook*, 251 F. Supp. 401 (M. D. Ala. 1966) (three judge court) (exclusion of

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[21] Compare Barnett v. United States, 376 U.S. 681, 701-24 (1964) (Appendix to Opinion of the Court), with id. at 740-51 (dissenting opinion of Mr. Justice Goldberg).

[22] 18 U.S.C. § 1.

[23] No. 1070, October 1966 Term, 87 S. Ct. 1346 (1967).

[24] Magna Charta, ch. 39, *supra*.

women).[25] See *Schowgurow v. State*, 240 Md. 121, 213 A. 2d 475 (1965) (exclusion of atheists). The right of a defendant to a jury reflecting a fair cross section of the community has been held to apply where there is no proof of actual prejudice to the defendant, *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Strauder v. West Virginia*, *supra*, 100 U.S. at 309, and where the defendant is not a member of the class excluded, *Allen v. State*, 110 Ga. App. 56, 137 S.E. 2d 711 (1964); *State v. Madison*, 240 Md. 265, 213 A. 2d 880 (1965). See *Labat v. Bennett*, *supra*, 365 F. 2d at 723, n. 43.

Further, this Court has repeatedly struck down state court convictions, where it appeared that jurors had been exposed to prejudicial newspaper publicity, or other influences inimical to the defendant. *Parker v. Gladden*, *supra* (remarks of bailiff); *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) (newspaper publicity); *Estes v. United States*, 381 U.S. 532, 545 (1965) (broadcasting of trial); *Irwin v. Dowd*, *supra* (newspaper publicity); *Moore v. Dempsey*, 261 U.S. 86 (1923) (mob domination).

It would be ironic indeed if a state were permitted to nullify this Court's carefully developed protections of the jury system by substituting for trial by jury trial by a single judge, who cannot represent a fair cross section of the community and who is frequently exposed to official and unofficial influences prejudicial to the defendant.

c. *Recognition by the States of the Fundamental Importance of Trial by Jury in Criminal Cases*

It is a further measure of the importance accorded trial by jury that in thirty-eight states a right at least equal to that secured by the Sixth Amendment is constitutionally guaranteed; in each of these states a defendant

[25] But see Hoyt v. Florida, 368 U.S. 57 (1961).

in a criminal case subject to a maximum term of imprisonment in excess of six months cannot be convicted without the unanimous verdict of a twelve man jury.[26] See Appendix B which sets forth the scope of the right to trial by jury in each of the states. Ten additional states and most of New York[27] guarantee the right to trial by jury in all cases in which that right is available under the Sixth Amendment, although modifications of the requirements of a twelve man jury or a unanimous verdict are made in some cases, frequently only cases not punishable by more than one year imprisonment. Appendix B. With one narrow exception,[28] Louisiana is the only jurisdiction in the United States where all right to trial by jury is denied in a class of cases in which the right is guaranteed at common law and under the Sixth Amendment. In Louisiana, the right is denied by statute in a number of serious criminal cases, including at least one offense punishable by up to ten years imprisonment.[29]

d. *Trial by Jury Secures the Individual Against Arbitrary Official Conduct*

The right in a criminal proceeding to trial by a jury fairly representative of the community is frequently a defendant's only protection against arbitrary official conduct. In this case, appellant was arrested at the height of official opposition to court-ordered school desegregation in Plaquemines Parish.[30] The prosecution was initiated

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[26] In Patton v. United States, 281 U.S. 276 (1930), the Court stated that the Sixth Amendment guarantees a twelve man jury and a unanimous verdict. 281 U.S. at 288. The cases cited in note 5, *supra*, hold that the jury trial right applies under the Sixth Amendment in all but "petty offenses." See 18 U.S.C. § 1.

[27] The New York practice is set forth in Appendix B, p. 8a.

[28] See note 27, *supra*.

[29] LA. REV. STAT. 14:34.1 (Cum. Supp. 1962). The right to trial by jury in Louisiana is summarized in Appendix C.

[30] See United States v. Plaquemines Parish School Board, 12 Race Rel. L. Rep. 219 (E.D. La. Oct. 21, 26, 1966) (Supplemental Order); United States v. Plaquemines Parish School Board, Civil Action No. 66-71A (E.D. La. June 27, 1967) (Findings of Fact and Conclusion of Law, Second Supplemental Order).

not by the indictment of a grand jury, but by a Bill of Information filed by the District Attorney, Leander Perez, Jr.

At trial, appellant asserted that he had acted to protect the Negro boys from violent interference with their exercise of federal rights and that he had acted entirely peacefully. It is appellant's position that the prosecution against him was part of the general official effort to discourage the exercise of rights under the federal court order. On the other hand, the state contended that appellant had actually slapped one of the boys on the elbow and had thus, at least technically, committed a battery. Once the factual dispute was resolved in the state's favor on the basis of more than "no evidence",[31] in a proceeding that had the objective earmarks of fairness,[32] it is doubtful that other remedies remained available for the vindication of appellant's right. *Cf. City of Greenwood v. Peacock*, 384 U.S. 808, 828-29 (1966).

"The vindication of the defendant's federal rights", and particularly his basic right to an impartial determination of guilt or innocence "is left to the state courts . . . " (*Id.* at 828). Due process of law requires that this determination be made by twelve of the defendant's peers, and not by a "justice . . . named by the Crown . . . who might . . . imprison . . . any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure." IV BLACKSTONE, *op. cit. supra*, at *349-50.

> . . . [I]n times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the Crown, in suits between the king and the subject, than in disputes between

[31] Thompson v. Louisville, 362 U.S. 199 (1960).
[32] Townsend v. Sain, 372 U.S. 293 (1963).

> one individual and another. . . . [T]he founders of the English law have with excellent forecast contrived . . . that the truth of every accusation . . . should afterwards be confirmed by the unanimous suffage of twelve of [defendant's] equals and neighbours, indifferently chosen and superior to all suspicion.[33]

CONCLUSION

This appeal raises an issue of fundamental importance to our system of criminal justice. The Court has not directly considered the applicability of the Sixth Amendment jury trial guarantee to the states since 1900, at a time when it was thought that none of the guarantees of the Sixth Amendment applied in the state courts. In light of the recent cases in this Court applying to the states all the rights of the Sixth Amendment other than trial by jury, and in light of the historical and contemporary materials demonstrating the significance of trial by jury, the issue should be reconsidered by the Court at this time.

Respectfully submitted,

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[33] IV BLACKSTONE, *op. cit. supra* *349-50.